

AUG 12 1988

JOSEPH F. SPANIOL, JR.
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No. 88-143

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF PHILADELPHIA, and
JAMES STANLEY WHITE, in his capacity as
MANAGING DIRECTOR, and
WILLIAM J. MARAZZO, in his capacity as
WATER COMMISSIONER,

Petitioners,

v.

CONCERNED CITIZENS OF BRIDESBURG, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

**BRIEF IN OPPOSITION OF
CONCERNED CITIZENS OF BRIDESBURG, et al.**

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COUNTER-STATEMENT OF PETITIONERS QUESTIONS

1. Whether petitioners' challenge to subject matter jurisdiction was made moot when plaintiffs' federal claim was judicially determined to have been in effect continuously throughout the litigation.
2. Whether the City of Philadelphia is immunized from monetary civil contempt sanctions imposed by a federal court.

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v.

CONCERNED CITIZENS OF BRIDESBURG, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF CONCERNED CITIZENS OF BRIDESBURG, et al.

Respondents, Concerned Citizens of Bridesburg, et al., respectfully request the Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit reported at 843 F.2d 679 (3d Cir. 1988) which is reproduced in petitioner's appendix at A-1 to A-9.

COUNTER-STATEMENT OF THE CASE

Concerned Citizens of Bridesburg et al. on January 3, 1985 filed a citizen lawsuit pursuant to the Clean Air Act, 42 U.S.C.

§ 7604, to enjoin the Water Department of the City of Philadelphia ("City") from operating its Northeast Water Pollution Control Plant ("N/E WPCP") in violation of the odor regulations in the Pennsylvania State Implementation Plan ("SIP"), 40 C.F.R. 52.2020 et seq.

The City moved to dismiss contending the odor regulations in the Pennsylvania SIP were invalid and unenforceable. After extensive briefing the district court issued a comprehensive opinion denying the City's motion. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, C.A. No. 85-14 (E.D. Pa. 4/23/85).¹

The City then filed a Petition for Review against the EPA, pursuant to 42 U.S.C. § 7607(b), seeking to invalidate the EPA action that had incorporated the odor regulations into the Pennsylvania SIP. 38 Fed Reg 32893 (11/28/73). The Court of Appeals dismissed the City's Petition for Review because it had been filed after the time period allowed by 42 U.S.C. § 7607(b). *City of Philadelphia v. United States Environmental Protection Agency*, No. 85-3285 (3rd Cir. 8/22/85).² The City did not seek a writ of certiorari to challenge the Court of Appeals decision.

Trial on the merits of the Concerned Citizens of Bridesburg lawsuit was held from May 5 to May 8, 1986. After trial, while the district court decision was pending, the EPA published a rule deleting the odor regulations from the Pennsylvania SIP, 51 Fed Reg. 18438 (5/20/86).

The District Court judgment was filed July 28, 1986. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, 643 F. Supp. 713 (E.D. Pa 1986) (A-24).³ The court noted that EPA's deletion of the odor regulation removed plaintiff's federal claim but that it did not remove the court's jurisdiction to decide the pendent state common law claim of maintaining a public nuisance. (A-48, A-50-51).

1. Petitioner neglected to include the district court opinion of April 23, 1985 in the Appendix.

2. Petitioner also neglected to include the Third Circuit Dismissal of the City Petition in the Appendix.

3. References are to Appendix prepared by Petitioner.

The district court held that the City was maintaining a public nuisance as evidenced by the numerous malodorous emissions from the N/E WPCP that were causing substantial harm, injury, annoyance and discomfort to the residents in the area of the N/E WPCP in violations of the odor regulations under Pennsylvania law. (A-54, A-55). By way of remedy the court, *inter alia*, enjoined defendants from operating the N/E WPCP in violation of the state odor regulations (A-56).

The district court order of July 28, 1986 was a final judgment from which the City could have appealed. On appeal the City could have challenged the jurisdictional issues considered and decided by the final judgment including the district court's April 23, 1985 opinion declaring the odor regulations in the Pennsylvania SIP to be enforceable regulations. The City, however, did not appeal from the July 28, 1986 final judgment.

Several months after the July 28, 1986 court injunction, Concerned Citizens of Bridesburg moved to declare defendants in civil contempt because of the repeated violations of the injunction. Following a 3 day hearing, the district court, on January 28, 1987, filed an opinion and order declaring the City to be in civil contempt and imposing civil contempt sanctions to coerce defendants into compliance. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, C.A. 85-14 (E.D. Pa. 1/28/87) (A-12). The sanctions, *inter alia*, required defendants to pay monetary penalties into the Registry of the Court for future violations of the injunctions, these funds to be available to compensate plaintiffs for actual losses due to the city's violations. (A-19, A-20).

Defendants appealed the contempt judgment of January 28, 1987. The appeal, essentially, challenged the jurisdiction of the district court, though defendants had failed to appeal the underlying judgment of July 28, 1986 which had considered and ruled on all of the jurisdictional issues.

Defendants also appealed the contempt judgment in respect to the monetary contempt sanctions imposed by the district court.

While the City's appeal of the contempt order was pending, the Court of Appeals invalidated EPA's rule deleting the odor

regulations. *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency*, 836 F2d 777 (3rd Cir. 12/18/87). (A-96) The EPA did not seek a writ of certiorari to challenge the decision.

Thereafter, the district court's contempt order of January 28, 1987 was affirmed. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, 843 F2d 679 (3rd Cir. 3/31/88) (A-1). The Court of Appeals held that the City's challenges to jurisdiction had been made moot by the court decision invalidating the EPA rule, (A-6, A-7).

The Court of Appeals also rejected the City's arguments in respect to the monetary sanctions imposed by the district court to coerce compliance with the July 28, 1986 injunction (A-8, A-9).

Reasons for Denying the Writ

SUMMARY

The petition for a writ of certiorari presents no questions of significance or importance. The decision of the Court of Appeals was unanimous and clearly correct. The petition for a writ should be denied.

The principal issue raised by the petition for a writ concerns jurisdiction. The district court judgment of July 28, 1986 (A-24) considered and decided all the jurisdictional issues. The district court had ruled that federal subject matter jurisdiction existed at the outset of the case by reason of the substantial allegations that defendants were violating the odor regulations in the Pennsylvania State Implementation Plan (SIP) under the Clean Air Act; that the federal claim had been removed after trial on the merits but prior to the July 28, 1986 judgment, by reason of the EPA rule of May 20, 1986 deleting the odor regulations from the Pennsylvania SIP, but the district court had maintained jurisdiction to decide the pendent state common law claim of maintaining a public nuisance.

Had the defendants appealed from the July 28, 1986 judgment they could have had a judicial review of all the jurisdictional matters concerned with pendent jurisdiction and

with the enforceability of the odor regulations in the Pennsylvania SIP. The defendants, however, chose not to file an appeal.

These jurisdictional issues, however, were raised by defendants on their appeal of the civil contempt order issued six months later, on January 28, 1987. When the Court of Appeals came to decide the appeal the material facts had changed. By then, the EPA's rule deleting the odor regulations had been invalidated and nullified by the Court of Appeals (A-96). Thus the federal claim providing jurisdiction had been restored as though it had existed continuously throughout the litigation.

The odor regulations in the Pennsylvania SIP have never been invalidated by a state court or a federal court; nor has any state court or federal court ever found that the odor regulations had been invalidly incorporated into the Pennsylvania SIP. These odor regulations in the SIP, therefore, are regulations that may be enforced by citizen lawsuits under the Clean Air Act.

The Third Circuit decision affirming the contempt order of January 28, 1987 stands for the proposition that SIP provisions may be enforced by citizen lawsuits under the Clean Air Act. It is not in conflict with the Seventh Circuit which held that a SIP provision is not enforceable if it has been ruled to be invalid by a state court.

The defendant's contention that the federal district court is barred from imposing monetary civil contempt sanctions on the City of Philadelphia by reason of a State tort liability act misconstrues the nature of a contempt sanction and suggests that federal courts are without power to enforce their own decrees against a Pennsylvania municipality. Defendant's contention is incorrect.

I. Subject Matter Jurisdiction Has Existed Throughout This Litigation.

A. Odor Regulations in the Pennsylvania SIP Furnish Subject Matter Jurisdiction

The citizen lawsuit brought by Concerned Citizens of Bridesburg derives jurisdiction from 28 U.S.C. § 1331 because

the case arises from the Clean Air Act, 42 U.S.C. § 7401 et seq. and from the citizen lawsuit provision, 42 U.S.C. § 7604, of the Clean Air Act.

The complaint alleged that the City was operating its N/E WPCP in violation of the odor regulations in the Pennsylvania SIP, 40 CFR 52.2020 et seq., which had been incorporated into the Pennsylvania SIP in 1973 by the EPA pursuant to 42 U.S.C. 7410. 38 Fed. Reg. 32893 (11/28/73)

Provisions of a SIP are emission standards or limitations, 42 U.S.C. § 7604(f), which are enforceable under the federal-state-private enforcement scheme of the Clean Air Act, *Illinois v Celotex Corporation*, 516 F. Supp. 716, 717 (C.D. Ill. 1976); *Citizens Association of Georgetown v. Washington*, 383 F. Supp. 136, 139 (D.D.C. 1974). See *Train v. NRDC*, 421 U.S. 60, 92 (1975). Jurisdiction was established here by substantial allegations that defendants were violating the odor regulations in the Pennsylvania SIP promulgated by the EPA. Since the action arises out of alleged violations of federal law, jurisdiction is provided by 28 U.S.C. § 1331. Since plaintiffs provided 60 day notices of intent to sue jurisdiction is also provided by 42 U.S.C. § 7604.

Defendants contend, however, that the odor regulations in the Pennsylvania SIP are not enforceable under the Clean Air Act. This contention was rejected by the district court, in a comprehensive opinion, because defendants could not demonstrate that the odor regulations were wholly unrelated to EPA's ambient air quality standards. *Concerned Citizens of Bridesburg v. Philadelphia Water Dept.*, C.A. No. 85-14 (E.D. Pa. 4/23/85). See *Friends of the Earth v. Potomac Electric Power Co.*, 419 F. Supp 528, 533-34 (D.D.C. 1976).

The City then challenged the validity of the EPA action, 38 Fed. Reg. 32893 (11/28/73), that had incorporated the odor regulations into the Pennsylvania SIP. The City filed a Petition for Review, pursuant to 42 U.S.C. 7607(b), against the EPA but the Court of Appeals dismissed, on the motion of the EPA, because the City's Petition for Review had been filed beyond the

time provided by the Clean Air Act. *City of Philadelphia v. United States Environmental Protection Agency* No. 85-3285 (3d Cir. 8/22/85).

In sum, the odor regulations in the Pennsylvania SIP existed when the complaint was filed. The violations of these regulations provided jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 7604. These odor regulations are valid and enforceable under federal law; no court has ever ruled otherwise.

B. The Odor Regulations In the Pennsylvania SIP Have Continued To Exist Throughout the Litigation

Trial on the merits of plaintiffs complaint was held May 3 through May 8, 1986. After trial but prior to the issuance of the court judgment, the EPA published a rule that deleted the odor regulations from the Pennsylvania SIP. 51 Fed. Reg. 18438 (5/20/86).

Thereafter, on July 28, 1986, the district court issued its judgment (A-24). Noting EPA's rule the district court recognized that the federal claim no longer existed but the court exercised its discretion to maintain jurisdiction in respect to the pendent state common law claim of maintaining a public nuisance (A-48-51). The court found that the malodorous emissions from the N/E WPCP were in violation of state odor regulations and that such violations constituted a public nuisance. The district court, therefore, issued an order (A-56) enjoining the defendants from any further violation of the state odor regulations.⁴

Concerned Citizens of Bridesburg, challenged EPA's rule deleting the odor regulations. This challenge, pursuant to 42 U.S.C. § 7607(b) of the Clean Air Act, was upheld in *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency*, 836 F2d 777 (3d Cir. 12/18/87) (A-96, A-118). The effect of this decision was to nullify the EPA rule thereby restoring the validity of the odor regulations in the Pennsylvania

4. The state odor regulations found to have been violated by the district court are the exact same odor regulations that are in the Pennsylvania SIP.

SIP as though EPA had never issued the rule. See *United States v. Larionoff*, 431 U.S. 864, 873, n.12 (1977), *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The decision invalidating the EPA rule was issued while defendants' appeal of the contempt order was under consideration by the Court of Appeals. The Court of Appeals took note of that decision; correctly recognized that it made the defendant's arguments regarding jurisdiction moot and affirmed the district court's contempt order. (A-6, A-7).

The odor regulations in the Pennsylvania SIP which existed at the initiation of the complaint continued to exist throughout the litigation and continued to provide federal jurisdiction.

C. Petitioners Are Precluded From Collateral Attack on the Contempt Judgment

The district court judgment of July 28, 1986 enjoined defendants from operating the N/E WPCP in violation of the odor regulations under Pennsylvania's Air Pollution Control Act, 35 P.S. § 4001 et seq, and under the Philadelphia Air Management Code (A-56). It was a final order that could have been appealed. Since the judgment of July 28, 1986 and the prior interlocutory opinion of April 23, 1985 considered and ruled on the City's jurisdictional objections, the City had the opportunity to have appellate review of these issues by an appeal of the July 28, 1986 judgment. The City chose not to appeal.

However, when the district court declared the defendants to be in civil contempt, on January 28, 1987 (A-21) and imposed a civil contempt sanction (A-22, A-23) the City did appeal and the principal issue raised by the City concerned the matter of jurisdiction.

The Court of Appeals recognized that the City's challenge to jurisdiction in the appeal of the contempt order was a collateral attack on the contempt order (A-6, A-7) but the Court had no reason to consider the propriety of the City's argument because the invalidation of the EPA rule had restored the federal claim on which original jurisdiction was based. (A-7)

Whether subject matter jurisdiction can be used to collaterally attack a subsequent contempt order by a party that had failed to bring a direct appeal poses the problem of balancing judicial concern for finality of judgments against judicial concern for the validity of judgments. The modern trend gives substantially greater weight to the concern for finality. *Hodge v. Hodge*, 621 F2d 590, 592 (3d Cir. 1980). Restatement (Second) Judgments, § 12, Comment C.

Greater concern for finality is also evidenced in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) where Chief Justice Hughes declared:

"The [district] court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action."

308 U.S. at 377. See *Gould v. Mutual Life Insurance Co. of New York*, 790 F2d 769, 774 (9th Cir. 1986).

In *Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxite de Guinee*, 456 U.S. 694 (1982) the Supreme Court declared:

"A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that the principles of res judicata apply to jurisdictional determinations — both subject matter and personal." (citation omitted)

Id., 456 U.S. at 702 n.9.

The City's failure to take a direct appeal of the July 28, 1986 judgment precludes the city from collaterally attacking the contempt judgment of January 28, 1987. The sustained existence of the odor regulations in the Pennsylvania SIP makes the City's jurisdictional arguments moot, whether or not they could assert a collateral attack.

D. There is no Conflict Between the Third Circuit and the Seventh Circuit

The City has attempted to create a conflict between the Third and Seventh Circuits in respect to the enforceability of SIP provisions. No such conflict exists.

Sierra Club v. Indiana-Kentucky Electric Corp., 716 F2d 1145 (7th Cir. 1983), affirmed a district court order dismissing a Clean Air Act citizen lawsuit because the SIP provision at issue had been invalidated by an Indiana State court. The Seventh Circuit correctly reasoned that if the provision had been invalidly adopted by the State it was a nullity ab initio and therefore, could not be enforced though it had been incorporated by the EPA into the Indiana SIP.

In contrast to the Seventh Circuit case, the Third Circuit affirmance of the January 28, 1987 contempt order concerned provisions of the Pennsylvania SIP which had been validated by the courts on numerous occasions. No state court or federal court had ever declared the odor regulations to be invalid, nor had any court invalidated the procedure by which the regulations had been incorporated into the Pennsylvania SIP.

The Third Circuit held that a SIP provision that had not been invalidated by any court is a provision that is enforceable through a Clean Air Act citizen lawsuit. The Seventh Circuit held that a SIP provision judicially declared to be invalid by a State Court is a SIP provision that could not be enforced by a Clean Air Act citizen lawsuit. There is no conflict between these decisions.⁵

5. It should be noted that the district court judgment of July 28, 1986, which was issued when the EPA rule deleting the odor regulations from the SIP was apparently in effect, did not enjoin defendants from violating the odor regulations in the Pennsylvania SIP. Instead, the injunction prohibited defendants from violating the odor regulations under the Pennsylvania Air Pollution Act and the Philadelphia Air Management Code (A-56).

II. The District Court Is Not Barred From Imposing Monetary Civil Contempt Sanctions Against the City of Philadelphia

The district court contempt order of January 28, 1987 requires the City, *inter alia*, to pay monetary penalties into the Registry of the Court for repeated violations of the court injunctions. (A-21, A-22) These monetary penalties are to be paid into a special fund which may be used to compensate named plaintiffs who can demonstrate, by clear and convincing evidence, actual losses due to the City's violations of the injunction. (A-19, A-20)

The City contends these sanctions violate the provisions of Pennsylvania's Political Subdivision Torts Claims Act, 42 Pa. C.S.A. § 8541 et seq. (A-88) and therefore, the City argues that the contempt sanctions are invalid. The City is incorrect, they have misconstrued the nature of the civil contempt sanctions.

The district court has wide discretion to fashion a civil contempt sanction to compel defendants to undertake the necessary actions required by a court's injunction. A contempt sanction seeks to correct a defendants' conduct to prevent future violations of a court order. *Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F.Supp. 869 882 (E.D. Pa 1982); *aff'd*, 678 F2d 470 (3d Cir. 1982); *cert den.* 459 U.S. 969 (1982); *In re Arthur Treacher's Franchise Litigation*, 689 F2d 1150, 1158 (3d Cir. 1982).

The contempt sanction is prospective in nature. It is not imposed in response to a tort claim. See *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1946); *Quinter v. Volkswagen of America*, 676 F2d 969, 975 (3d Cir. 1982). Therefore, the Tort Claims Act is not relevant or applicable to a federal court contempt sanction.

If the Tort Claims Act immunized the City from the contempt sanction it would frustrate the court's ability to enforce federal court orders against contumacious municipalities. This would violate the Supremacy Clause of the United States Constitution Article VI § 2.

It is well recognized that a court may award damages to persons incurring losses that result from acts in violation of court

injunctions. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1946), *Quinter v. Volkswagen of America*, 676 F2d 969 (3rd Cir. 1982).

These damage awards are not awards for losses due to tortious actions, they are awards for losses due to actions in violation of court orders. Therefore, the Tort Liability Act is not relevant or applicable to such damage awards.

The civil contempt sanctions imposed by the district court here do not conflict or violate the Pennsylvania Political Subdivision Tort Liability Act. The Court of Appeals was correct in affirming the district court order (A-8, A-9).

CONCLUSION

For the reasons set forth *supra*, Concerned Citizens of Bridesburg et al. respectfully request the Supreme Court of the United States deny the Petition for a Writ of Certiorari to review the opinion and decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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